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Labor Relations - Schools and School Districts - The Good Faith Issuance of Individual Teaching Contracts by a School Board before the Completion of the Negotiating Process Required by Statute Does Not Violate the Teachers' Representation and Negotiation Act

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The decision in *Brown* is a radical change from the majority of cases[50] and certainly presents a major administrative problem for the Bureau of Prisons.[51] However, the rehabilitation theory on which the Youth Act is based calls for special treatment, and by housing and training a youth offender with an adult offender, the Bureau of Prisons has not met the quid pro quo of the rehabilitation theory that was adopted in 1950.[52]

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LABOR RELATIONS—SCHOOLS AND SCHOOL DISTRICTS—THE GOOD FAITH ISSUANCE OF INDIVIDUAL TEACHING CONTRACTS BY A SCHOOL BOARD BEFORE THE COMPLETION OF THE NEGOTIATING PROCESS REQUIRED BY STATUTE DOES NOT VIOLATE THE TEACHERS' REPRESENTATION AND NEGOTIATION ACT

Petitioner, Dickinson Education Association[1] (D.E.A.), and Dickinson School District No. 1 (School Board) entered into contract

50. *See supra* note 27.

51. On October 27, 1977, there were 29,932 inmates confined within the federal prison system. In May 1977, there were 2,400 male and 264 female, for a total of 2,664 youth offenders in the system. This made up 9% of the total federal prison population. In order to comply with the ruling in *Brown*, the Bureau of Prisons would be required to physically move 7,000 plus inmates, involving 43 federal facilities housing youth offenders. The actual costs are impossible to estimate when one considers the mass disruption of the inmates involved. "While *Brown* was not a class action, its policy implications obviously extend beyond the three individual plaintiffs involved. Accordingly, a Task Force of Bureau of Prisons employees has been established to re-evaluate our present implementation of the segregation provisions in Section 5011 of Title 18 of the United States Code." Letter from Norman A. Carlson, Director of the Bureau of Prisons, to Paul F. Richard (November 1, 1977).

52. 431 F. Supp. at 766, 773.

1. In February of 1976 the Dickinson Education Association was recognized by the Dickinson School Board as the exclusive bargaining agent of teachers within its school system for the purpose of negotiating contracts on their behalf for the 1976-77 school term. Dickinson Education Ass'n v. Dickinson Public School Dist. No. 1, 252 N.W.2d 205, 208 (N.D. 1977).

N.D. CENT. CODE § 15-38.1-08 (1971), Right to Negotiate, states as follows: "Representative organizations shall have the right to represent the appropriate negotiating unit in matters of employee relations with the school board. Any teacher, or administrator, shall have the right to present his view directly to the school board."

N.D. CENT. CODE § 15-38.1-09 (1971), Subject of Negotiations, states as follows: "The scope of representation shall include matters relating to terms and conditions of employment and employer-employee relations, including, but not limited to salary, hours, and other terms and conditions of employment."

N.D. CENT. CODE § 15-38.1-12 (1971), Good Faith Negotiations, states as follows: "1. The school board, or its representatives, and the representative organization, selected by the appropriate negotiating unit, or its representatives, shall have the duty to meet at reasonable times at the request of either party and to negotiate in good faith with respect to:

(a). Terms and conditions of employment and employer-employee relations. . . ."

The D.E.A., as exclusive bargaining agent, appealed the finding of the District Court of Stark County, that the negotiations between it and the School Board complied with the good faith requirements of the applicable statutes. 252 N.W.2d 205 (N.D. 1977).

negotiations in March 1976. The parties agreed that an impasse[2] arose as of April 28, 1976.[3] The North Dakota Education Factfinding Commission[4] was contacted and it issued a written report of its findings and recommendations on June 1, 1976.[5] The parties reached no agreement on these recommendations. On or about June 18, 1976, the School Board caused to be issued individual teaching contracts to all teachers with whom negotiations were being carried on.[6] The D.E.A. contended that the issuance of said contracts had a chilling effect on negotiations and constituted bad faith.[7] On appeal the Supreme Court of North Dakota *held* that although the School Board did not complete the negotiation process required by the statute, in the absence of evidence that such noncompliance was the result of bad faith the School Board's issuance of individual teaching contracts was not a violation of the Teachers' Representation and Negotiation Act.[8] *Dickinson Education Association v. Dickinson Public School*

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2. Impasse situations are defined in N.D. CENT. CODE § 15-38.1-13 (1971) as follows:

> 1. An impasse shall be deemed to exist under any of the following conditions:
> a. Where an agreement as set forth in subdivision b of subsection 1 of section 15-38.1-12 has not been formulated and after a reasonable period of negotiation regarding terms and conditions of employment or employer-employee relations, a dispute exists between a school board and any representative organization, an impasse may be deemed to exist.
> b. When both parties agree than an impasse exists.
> c. In the event that the written agreement reached under section 15-38.1-12 does not include procedures for resolving a dispute which arises, an impasse may be deemed to exist.
> d. Written agreements negotiated under section 15-38.1-12 may include procedures to be invoked in the event of disputes under the contract. Where such procedures are inadequate to resolve the dispute, an impasse may be deemed to exist.
> 2. An impasse may be resolved in the following manner:
> a. The parties may agree upon mediation of the controversy by mutually selecting a mediator or mediators, and agreeing to a distribution of the cost of the mediation.
> b. If mediation fails or is not attempted, the aggrieved school board or representative organization may request the commission to render assistance as provided in this section.

3. Dickinson Education Ass'n v. Dickinson Public School Dist. No. 1, 252 N.W.2d 205, 208 (N.D. 1977).

4. The North Dakota Education Factfinding Commission was established by N.D. CENT. CODE §§ 15-38.1-03 and 15-38.1-04 (1971). The powers of the commission are generally stated in N.D. CENT. CODE § 15-38.1-05 (1971) which includes the power to adopt its own rules and regulations and any other powers authorized by law and under chapter 15-38.1. N.D. CENT. CODE § 15-38.1-13 (1971), which deals with impasse procedures, gives the commission the power to act as a fact-finder on the request of the negotiating parties. The commission will then consider the facts and make its findings and recommendations, or consider the report and recommendation of its appointed factfinder, and, after any further investigation as it may elect to perform, it will make its findings and recommendation Within twenty days after the request for factfinding assistance is received, the findings and recommendations of the commission shall be given to the contending parties and if the issue is not then resolved, will be made public in ten days.

5. 252 N.W.2d at 208.

6. *Id.*

7. Bad faith is defined as follows: "[A] neglect or refusal to fulfill some duty or contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." BLACK'S LAW DICTIONARY 176 (4th ed. 1968).

8. N.D. CENT. CODE ch. 15-38.1 (1971); 252 N.W.2d 205. The dissent found that the School Board had committed acts of bad faith. Dealing individually with members of the bargaining unit is a practice questioned in good faith dealings. The issuance of individual contracts was found by the dissent to be such a questionable practice. 252 N.W.2d at 215 (Vogel, J., dissenting).

Dist. No. 1, 252 N.W.2d 205 (N.D. 1977).

Legislation providing for collective bargaining for public employees was first enacted in this country in 1959. In that year the Wisconsin Legislature spelled out bargaining rights of municipal employees and established a mechanism for resolving disputes with employers.[9]

During the 1960s union organization and collective bargaining in public employment reached their peak.[10] During this period there was continual growth of public employee union membership and militancy, an increasing incidence of strikes and other "job actions,"[11] and the passage and amendment of many state laws regarding the right of employees of local governmental units to organize and to bargain collectively.[12]

In 1969 teacher disputes, nationally, accounted for a greater percentage of work stoppages in public employment than ever before.[13] In addition, in 1968 the United States Supreme Court reaffirmed the federal government's broad authority under the commerce clause to regulate the conditions of employment of state and local school and hospital employees.[14] In response, thirty-four states passed legislation providing for organization of and collective bargaining for public employees before 1970.[15]

The North Dakota Legislature passed the Teachers' Representation and Negotiation Act[16] in 1969. The purpose of this Act was "to promote the growth and development of education in North Dakota" and "to promote the improvement of personnel management and relations between school boards of public school districts and their certified employees."[17] The Act includes sections that provide for the following: (1) procedures for representative organizations of public school teachers to negotiate with school boards with reference

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9. WIS. STAT. ANN. § 111.70 (West 1974 & Supp. 1977).

10. Cohany & Dewey, *Union Membership Among Government Employees*, 93 MONTHLY LAB. REV. 15 (1970).

11. "Job actions" are strikes and other work interference tactics such as near stoppages, questionable picketing, threats of strikes, "working to rule" and stay-at-home sick demonstrations. M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 378 (1976).

12. Stutz, *The Resolution of Impasses in the Public Sector*, 1 URB. LAW. 320 (1969). In 1970, the leaders of the major teacher organizations, the National Education Association and the American Federation of Teachers, predicted that there would be more strikes that year than in the previous year. Moberly, *Causes of Impasse in School Board-Teacher Negotiations*, 21 LAB. L.J. 668 (1970). This prediction caused state legislatures to take a serious look at public employee relations in general and teacher relations specifically. Anderson, *Public Employee Bargaining*, 1 URB. LAW. 312, 313 (1969).

13. The statistics indicating this increase are set out in White, *Work Stoppages of Governmental Employees*, 92 MONTHLY LAB. REV. 29 (1969).

14. Maryland v. Wirtz, 392 U.S. 183 (1968). The part of the decision which removed the exemption previously extended to the States and their political subdivisions with respect to employees of state hospitals, institutions, and schools has been overruled by National League of Cities v. Usury, 426 U.S. 838 (1976). However, the causal effect of the *Wirtz* decision remains important in the development of public employee labor acts.

15. *See* Stutz, *supra* note 12, at 321.

16. N.D. CENT. CODE ch. 15-38.1 (1971).

17. N.D. CENT. CODE § 15-38.1-01 (1971).

to employer-employee relations;[18] (2) procedures to be used in the event of disagreement;[19] and (3) the establishment of an Education Factfinding Commission.[20]

This Act was first interpreted by the North Dakota Supreme Court in 1975 in *Edgeley Education Association v. Edgeley Public School District No. 3.*[21] In that case, the Education Association of Edgeley, North Dakota, brought suit alleging that the Edgeley School Board had tendered contracts to the teachers while negotiations were still in progress.[22] It was further alleged that this action violated the Teachers' Representation and Negotiation Act in that it had a chilling effect on the negotiations and constituted bad faith.[23] The court held that although the school board, in attempting to follow appropriate statutes in negotiating with teachers, had overstepped the statutory requirements, this overreaching had been done in good faith and no legal rights or privileges had been denied as a result of those actions.[24]

The court in *Edgeley* based its interpretation of the statute's good faith provision[25] on whether the defendant failed to perform any duties imposed by law.[26] This test represented the court's interpretation of the legislative intent in enacting the statute.[27] The sections of the statute are to be construed *in pari materia,*[28] indicating a need for joint interpretations. The good faith provision was therefore interpreted in relation to the purpose provision.[29]

The court in *Edgeley* further considered legislative intent when looking at the impasse procedures.[30] The Education Factfinding Commission lacks the statutory authority to bind the negotiating parties.[31] As a result, the court surmised that the legislature had intended the negotiating parties or the Education Factfinding Com-

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18. N.D. CENT. CODE § 15-38.1-12 (1971).
19. N.D. CENT. CODE § 15-38.1-13 (1971).
20. N.D. CENT. CODE § 15-38.1-03 (1971).
21. 231 N.W.2d 826 (N.D. 1975).
22. *Id.* at 828.
23. *Id.*
24. *Id.* at 833.
25. N.D. CENT. CODE § 15-38.1-12 (1971). *See supra* note 2, for quotation of the statute.
26. 231 N.W.2d at 833.
27. *Id.*
28. *In pari materia* laws must be construed with reference to each other. BLACK'S LAW DICTIONARY 1270 (4th ed. 1968).
29. N.D. CENT. CODE § 15-38.1-01 (1971), Purpose, provides as follows:
> In order to promote the growth and development of education in North Dakota which is essential to the welfare of its people, it is hereby declared to be the policy of this state to promote the improvement of personnel management and relations between school boards of public school districts and their certified employees by providing a uniform basis for recognizing the right of public school certified employees to join organizations of their own choice and be represented by such organization in their professional and employment relationships with the public school districts.
30. The impasse provision was not in issue in *Edgeley*, but the court found it necessary to mention it as an example of how it came to its determination of legislative intent. 231 N.W.2d at 833.
31. N.D. CENT. CODE § 15-38.1-13 (1971).

mission to rely on persuasion rather than compulsion.[32]

The court in *Dickinson* was concerned mainly with the procedures to be followed upon the occurrence of an impasse,[33] and relied heavily upon *Edgeley* in coming to its decision.[34] Upon declaring an impasse, the parties may request, as they did in *Dickinson*, that the North Dakota Education Factfinding Commission prepare a report and make recommendations.[35] This is the only time the Factfinding Commission is active in the negotiating process under the statute.[36]

The publication of the Education Factfinding Commission's report, however, does not conclude the contract negotiations.[37] A school board is not entitled to issue contracts, as the School Board in *Dickinson* did after the publication of the Factfinding Commission's report, without concluding the negotiating process.[38] The court in *Dickinson*, however, found no indication of bad faith on the part of the School Board in issuing the contracts.[39] Rather, they found that noncompliance may have been the result of an incorrect interpretation of ambiguous statutory language which failed to specify what, if anything, should occur after the report of the Education Factfinding Commission has been published.[40] The court found, however, that the statutory scheme recognized that there comes a point when a school board must be allowed to make contractual offers to the teachers and the teachers must choose either to accept or to reject such offers.[41] The court allows the School Board to issue contracts sometime after the report of the Factfinding Commission has been made public.[42] They have not, however, defined any specific time or set of circumstances that would indicate an acceptable time for such issuance.

The court indicates that to require negotiations to continue until a final contract is agreed to would be a major departure from the prior interpretation of the statutory scheme adopted by the legislature.[43] Any additional interpretations are deferred by the court to

32. 231 N.W.2d at 833.
33. 252 N.W.2d at 211, 213.
34. *Id.* at 209, 213.
35. *See supra* note 3. Once an impasse situation has been reached, the parties have the option of agreeing upon a mediator and using this method to resolve their differences or they may ask the Factfinding Commission to make recommendations. Neither of these methods are active in the negotiation process until they are called into use by the parties. Also, neither has any binding authority on the parties. N.D. CENT. CODE § 15-38.1-13 (1971).
36. N.D. CENT. CODE § 15-38.1-13 (1971).
37. 252 N.W.2d at 211.
38. 252 N.W.2d at 211. The court did not define what the conclusion of the negotiating process was, nor what was involved in the process.
39. *Id.*
40. *Id.* The court prefers to blame ambiguous statutory language for incorrect interpretation rather than saying it was bad faith. It is arguable, however, that in light of the similar fact situation in *Edgeley*, the statutory language should have been much less ambiguous after once being interpreted.
41. *Id.* at 209. This process seems to test the strength of the negotiating unit.
42. *Id.*
43. *Id.* at 213. The court relies heavily on legislative intent. The prior statutory inter-

the legislature.[44] The opinion indicates that because two years had passed between the *Edgeley* decision and the *Dickinson* case, the legislature would have amended the statute if it had found it necessary.[45]

The majority opinion specifically declined to consider the case law arising from labor relations.[46] This reluctance was indicated in *Edgeley* and was repeated in *Dickinson*.[47] Cases dealing with the interpretation of federal or state collective bargaining statutes were considered of little assistance because of dissimilarities between key provisions in the respective Acts.[48] Decisions involving labor disputes in the private sector were not found to be of any significant assistance either.[49] The *Dickinson* court also excluded consideration of the list of unfair labor practices from the North Dakota Labor-Management Relations Act[50] and the mediation provisions in Chapter 34-11, Mediation of Disputes Between Public Employers and Employees,[51] because they had been passed separately from the Teachers' Representation and Negotiation Act. The majority found this separate passage to be an indication that the legislature, for whatever reasons, wanted to deal with teacher-labor practices differently than either its treatment of private sector employees or other public sector employees.[52]

Justice Vogel, in his dissent, assumes that the legislature, in creating a system of collective bargaining for teachers, did so with knowledge of what had gone before in the field of labor relations and public employees, and legislated accordingly.[53] The dissent also ques-

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pretation referred to is *Edgeley*, which does not give a very broad base from which to work.

44. *Id.*

45. *Id.*

46. *Id. See, e.g.*, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); Int'l Ladies' Garment Workers Union, AFL-CIO v. NLRB, 463 F.2d 907 (D.C. Cir. 1972); NLRB v. Pepsi-Cola Bottling Co. of Miami, 449 F.2d 824 (5th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972); NLRB v. Local 254, Bldg. Serv. Employees Int'l Union, AFL-CIO, 376 F.2d 131 (1st Cir. 1967), *cert. denied*, 389 U.S. 856 (1967).

47. Dickinson Education Ass'n v. Dickinson Public School Dist. No. 1, 252 N.W.2d 205, 213 (N.D. 1977); Edgeley Education Ass'n v. Edgeley Public School Dist. No. 3, 231 N.W.2d 826, 834 (N.D. 1975).

48. *Id. See, e.g.*, MINN. STAT. ANN. §§ 179.61-.74 (West 1966 & Supp. 1978); WIS. STAT. ANN. § 111.70 (West 1974 & Supp. 1977).

49. 252 N.W.2d at 213.

50. N.D. CENT. CODE ch. 34-12 (1972 & Supp. 1977), Labor-Management Relations Act. N.D. CENT. CODE § 34-12-03(1) (1972), defines unfair labor practices for employers as interfering with the right of employees to form labor organizations, to discourage or encourage membership through hiring practices, or to refuse to collectively bargain. Unfair labor practices on the part of labor organizations or its agents are any forms of restraint or force put on employers to discriminate against employees in their exercise of rights, in the selection of bargaining representatives or forcing self-employed persons or employers to join the organization, as well as refusing to bargain collectively or requiring payment of excessive fees. *Id.* at § 34-12-03(2).

51. N.D. CENT. CODE § 34-11-01 (1972) provides for the authority of the mediation board and requires good faith and cooperation. N.D. CENT. CODE § 34-11-02 (1972) provides for the establishment of a mediation board and the selection of a chairperson. N.D. CENT. CODE § 34-11-03 (1972) defines the duties of the mediation board and states the effect of the determination of the issues and the recommendations.

52. 252 N.W.2d at 213.

53. *Id.* at 215.

tions the manner in which the court interpreted the negotiation procedures,[54] and briefly summarized the majority opinion as follows:

> Anyone reading the majority opinion without reading [North Dakota Century Code chapter 15-38.1], would think that the statute provided for something called a "good-faith negotiation process" which could be terminated by the publication of the findings of the Education Factfinding Commission, that thereafter the representation of teachers by their chosen representative organization and bargaining unit was at an end, and that the School Board became free to negotiate with teachers individually.[55]

The dissent continued by explaining why such an interpretation would be incorrect. The basis of the explanation was the fact that termination of good faith bargaining between the representatives and consent to bargain individually with organization members are not mentioned in the statute.[56] It is further pointed out by the dissent that dealing individually with members of bargaining units cannot be done in good faith,[57] and that once a duty to bargain in good faith is established as in the Teachers' Representation and Negotiation Act it continues regardless of whether or not agreement is reached.[58] The *Dickinson* interpretation does not define what steps follow the report of the Education Factfinding Commission except to say the process continues until agreement is reached.[59]

The court's interpretation of the Teachers' Representation and Negotiation Act should limit times, qualify effects, and define practices and procedures of the Act in line with case law and statutes relating to the field of labor relations.[60] A failure on the part of the court to give a meaningful interpretation to the statute that is in line with other labor related statutes nullifies the intended purpose of the statute and returns teacher-school board relations to their pre-1969 status. The legislature should likewise reconsider the Act using both *Edgeley* and *Dickinson* as guides to point out problem areas that require clarification and additional procedures. The Act should be amended to alleviate problem areas and put meaning into the negotiation process. Such actions would hasten the "growth and

54. *Id.* at 214, 215.
55. *Id.* at 214.
56. N.D. CENT. CODE § 15-38.1-12 (1971).
57. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944). This has been held to be an unfair labor practice, *id.* at 684, even in the absence of bad faith. NLRB v. Pepsi Cola Bottling Co. of Miami, 449 F.2d 824 (5th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972).
58. 252 N.W.2d at 215.
59. *Id.* at 213.
60. *Id.* N.D. CENT. CODE ch. 15-38.1 (1971) should be construed in light of both N.D. CENT. CODE ch. 34-12 (1971) and N.D. CENT. CODE ch. 34-11 (1972) as well as other statutory case law available. *Id.*

development of education in North Dakota which is essential to the welfare of its people. . . ."[61]

SIMONE SANDBERG

INTOXICATING LIQUORS—DRAM SHOP ACT—TAVERN OWNER HELD LIABLE FOR INJURIES OF AN INTOXICATED PATRON

While decedent was a patron of defendants'[1] bar, defendants or their employees served alcohol to decedent which resulted in decedent's intoxication.[2] While intoxicated, decedent engaged in activities which resulted in injuries which caused his death.[3] Plaintiff[4] brought an action under Michigan's wrongful death act,[5] alleging that defendants knew decedent was an alcoholic, had agreed not to serve decedent any alcoholic beverages, and that therefore defendants were guilty of gross negligence and willfull wanton and intentional misconduct in serving the decedent.[6] Defendants filed a motion for summary judgment based on Michigan's dram shop act,[7]

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61. N.D. CENT. CODE § 15-38.1-01 (1971).

1. At the time the action was brought defendants owned the bar in which decedent was allegedly served alcoholic beverages. Redford Township, a Michigan Public Body Corporation, was also a defendant but was not involved in the appeal. Grasser v. Fleming, 74 Mich. App. 338, ——, 253 N.W.2d 757, 758 (1977).
2. *Id.*
3. *Id.*
4. Plaintiff was executrix of her deceased father's estate. *Id.*
5. *Id.* Michigan's wrongful death act, MICH. COMP. LAWS ANN. § 600.2921 (Supp. 1977) states as follows:

> All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claim may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

MICH. COMP. LAWS ANN. § 600.2922(1) (1968) states as follows:

> Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section.

6. 74 Mich. App. at ——, 253 N.W.2d at 758.
7. *Id.* Michigan's dramshop act, MICH. COMP. LAWS ANN. § 436.22 (Supp. 1977) states as follows:

> Every wife, husband, child, parent, guardian, or other persons who shall be injured in person or property, means of support or otherwise, by a visibly intoxicated person by reason of the unlawful selling, giving, or furnishing to any such persons any intoxicating liquor and the sale is proven to be a proximate cause of the injury or death, shall have a right of action in his or her name against the person who shall by such selling or giving any such liquor have caused or contributed to the intoxication of said person or persons who shall have caused or contributed to any such injury and the principal and